IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.10105 OF 2004

Sangli Urban Co-op. Bank Ltd.).. Petitioner

Versus

N.W.Kulkarni).. Respondent

Mr.N.V.Walawalkar for the Petitioner.

Mr.S.S.Patwardhan for the Respondent.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 29TH MARCH 2005

P.C.:

. The order impugned is of the Industrial Court, Sangli dated 7th October 2004 passed in Revision Application (ULP) No.11 of 1997 filed under Section 44 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the Act"). The Industrial Court has confirmed the order of the Labour Court, Sangli dated 25th March 1997 passed in Complaint (ULP) No.76 of 1994 which is also challenged in this Petition.

2. The main grievance of the Petitioner is that the Labour Court has found that the Respondent is an "employee" although his duties were such as to exclude him from the category of "employee" as defined under

Section 3(13) of the Bombay Industrial Relations Act, 1946. The Industrial Court in the Revision Application filed by the Petitioner has observed thus :

> "9. Points No.1 and 2 : At the outset, it must be noted that the point as to whether the original Complainant is an "Employee" of the Respondent Bank within the meaning of Section 3(5) of the 'M.R.T.U. and P.U.L.P. Act, 1971' read with Section 3(13) of B.I.R.Act, 1946' is not raised and not argued before this Court and therefore it is deem to have been waived and therefore finding of the Trial Court on this point need not be interfered with."

3. Mr.Walawalkar, learned Counsel appearing for the Petitioner, states that the findings of the Industrial Court that the issue as to whether the Respondent was an employee or not has been raised in the Revision Application and, therefore, the observation of the Industrial Court to the contrary is incorrect. Mr.Walawalkar very fairly states that no submissions were advanced on behalf of the Petitioner regarding this issue whether the Respondent was an employee as defined within the meaning of Section 3(5) of the Act read with Section 3(13) of the Bombay Industrial Relations Act, 1946. However, according to the learned counsel, consent or acquiesence cannot confer the jurisdiction to decide a Complaint on either the Labour Court or the Industrial Court. He urges that the Industrial Court was duty bound to consider all the grounds raised in the Revision Application.He relies on the judgments of the

Apex Court in the case of *Chiranjilal Shrilal Goenka* vs. *Jasjit Singh and others*, **(1993) 2 SCC 507** and *Kiran Singh and others* vs. *Chaman Paswan and others*, **AIR 1954 SC 349** in support of his submissions.

4. Whether or not a person is an employee or not is a mixed question of fact and law. The jurisdiction to decide whether the termination of service of a person claiming to be an employee exists with the Labour Court. This jurisdiction may be ousted only if the employer proves to the contrary, that the Complainant is not an employee as defined under Section 3(5) of the Act. If the employer choses not to press the issue or choses not to controvert the issue as to whether the Complainant is an employee, the Industrial Court cannot be faulted for not having decided this issue in Revision.

5. The Labour Court on evidence has concluded that the Respondent is an "employee" and has, therefore, dealt with the Complaint on merits. A specific finding of fact is recorded by the Labour Court that the Respondent is an "employee". This finding of fact has been challenged in the Revisional Court. The Revisional Court i.e. the Industrial Court under Section 44 has powers which are circumscribed and, therefore, it is not in every case that the Industrial Court will interfere with a finding of fact recorded by the Labour Court.

The Industrial Court has committed no error by recording that the issue has not been pressed or argued before it. Therefore, it has rightly been deemed to have been waived and the finding of the trial Court on the aspect as to whether the Respondent is an employee has not been interfered with. I see no reason to interfere with the orders of the Labour Court or the Industrial Court.

6. The reliance placed by Mr.Walawalkar on the aforesaid judgments does not carry his case any further. In the case of *Kiran Singh* (supra), the Apex Court has held that a defect of jurisdiction in respect of the subject matter of the action cannot be cured even by consent of parties. In the case of *Chiranjilal Goenka* (supra), the Apex Court held that even by consent of parties, jurisdiction cannot be conferred upon a Tribunal if the statute does not so confer it. There can be no quarrel with these principles. However, they are not applicable to the present case. It cannot be said that the Labour Court had no jurisdiction to decide whether the Respondent was an employee or not and, therefore, it did have the jurisdiction to decide the subject matter of the action before it. The Labour Court and the Industrial Court acting in exercise of their powers conferred under the Act, have the jurisdiction to decide as to whether a person is an employee. The Petitioner having not availed of their

right before the Industrial Court to point out as to how the Respondent was not an employee as defined under the Act cannot make a grievance about it in the present Petition.

7. On merits, the Industrial Court has concurred with the findings of the Labour Court that the Petitioner had committed the unfair labour practice complained of by the Respondent. The concurrent findings of fact recorded by both the Courts below need not be disturbed as they are neither perverse nor in excess of jurisdiction.

8. Petition rejected.